1989

State of Utah v. Donald R. Allen : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 890449-CA
v.	:	
DONALD R. ALLEN,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-1023(1)(b) (1986) (amended 1989), IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE DOUGLAS L. CORNABY, PRESIDING.

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of aggravated assault, a third degree felony, under Utah Code Ann. § 76-5-103(1)(b) (1978) (amended 1989).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF THE ISSUES ON APPEAL

Defendant's sole issue on appeal is whether there was sufficient evidence to support defendant's conviction. The State also argues that defendant's failure to support his argument by legal analysis or authority affords the court no basis from which to evaluate or rule on his appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following provisions are pertinent to this appeal:

Utah Code Ann. § 76-5-103 (1978):

> (1) A person commits aggravated assault if he commits assault as defined in section 76-5-102 and;
>
> (a) He intentionally causes serious bodily injury to another; or death or serious bodily injury.

(b) He uses a deadly weapon or such means or force likely to produce death or serious bodily injury.;

(2) Aggravated sexual assault is a felony of the third degree.

Utah Code Ann. § 76-5-102 (1978):

(1) Assault is;

(a) An attempt, with unlawful force or violence, to do bodily injury to another, or

(b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.

(2) Assault is a class B misdemeanor.

Utah Code Ann. § 76-2-102 (Supp. 1989):

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

Utah Code Ann. § 76-2-103(3) (1978):

A person engages in conduct:

. . .

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

STATEMENT OF THE CASE

Defendant was charged with aggravated assault, a third degree felony, under Utah Code Ann. § 76-5-103(1)(b) (1978) (amended 1989) and § 76-3-203 (Supp. 1989). A jury found him guilty as charged. On March 14, 1989, defendant was sentenced to the Utah State Prison for an indeterminate term of zero to five years and to an additional term in the Utah State Prison not to exceed five years, to be served consecutively, for the use of a firearm in the crime. Defendant filed his notice of appeal on May 22, 1989.

STATEMENT OF FACTS

On July 23, 1988, defendant, his wife, Gwen Allen, defendant's two minor children and some friends, Ed and Linda Ferrin, spent the afternoon at Mountain Green near Ogden, Utah, riding horses (T. 165, 457). During the afternoon the four adults in the group consumed somewhere between two and four six packs of beer (T. 339, 350). When the parties separated around sunset, neither Mrs. Allen nor defendant appeared to be intoxicated to the Ferrins (T. 343, 351-52).

Upon return to defendant's parents' residence, where defendant, Mrs. Allen and defendant's children lived, defendant took his children into the house (T. 174, 465). Mrs. Allen remained outside in defendant's father's pickup truck, which they had been using and drank some more beer (T. 174, 465-66). Defendant returned to the truck, and a short time later Mrs. Allen was shot in the right side of her head with defendant's Smith & Wesson .44 Special (T. 177-80, 468). Defendant, with the

help of his mother, carried Mrs. Allen into the house, gave her a shower and put her to bed (T. 82-83, 92-96, 472).

For the next week, until July 30, 1988, Mrs. Allen remained at home without medical intervention. Mr. Allen's close friend, Julie Krump, called six or seven times during that period but was not permitted to speak with her (T. 368). On July 30, defendant and his mother took Mrs. Allen to the emergency room at Humana David North Hospital, Ogden (T. 106, 476). An x-ray taken there indicated that a bullet fragment had entered Mrs. Allen's brain (T. 221). Mrs. Allen was then transferred to McKay Dee Hospital, Ogden, where she underwent neurosurgery to remove the bullet fragments (T. 126-135). Mrs. Allen, in critical condition at the time she was admitted to the hospital, subsequently recovered from her injury (T. 130-31).

Police investigation revealed bloody sheets and pillows in the room where Mrs. Allen lived for seven days (T. 427-28). Upon questioning, defendant told police that he owned five guns but did not admit ownership of the Smith and Wesson .44 Special that inflicted the injury to Mrs. Allen (T. 230). That gun was found wrapped in a towel under the driver's seat of defendant's own pickup truck (T. 382, 487). After the shooting defendant removed and washed the bloody seat cover from his father's pickup (T. 483-84).

At trial, defendant testified that on the night of the shooting, after he took his children into the house, Mrs. Allen and he were in his father's pickup truck. He stated that Mrs. Allen was depressed about a prior D.U.I. (driving under the

influence) arrest, got the gun and talked about killing herself. Defendant stated that he took the gun away, but Mrs. Allen grabbed for it, and it went off in her face. Defendant stated that he was about a foot and a half away from Mrs. Allen when the gun discharged (T. 465-68). Mrs. Allen could not remember the gun going off but stated that she was upset about the D.U.I., drunk and suicidal on the evening in question (T. 177-80).

Both defendant and Mrs. Allen testified that they were not aware, at the time of the shooting, that Mrs. Allen had been shot, and defendant testified that he did not learn that a bullet had entered his wife's head until told by police officers at the hospital one week later (T. 181, 477). Mrs. Allen stated that she found out that she had been shot after she awoke from a post-surgery coma, and that she had thought previously that she had been suffering from a bad hangover (T. 181). However, police officers and medical personnel from both Humana Davis North Hospital and McKay Dee Hospital testified to the presence of two wounds on Mrs. Allen's head, one in front of the right ear and one on her nose, as well as black eyes and swelling, clearly visible to them seven days after the shooting incident (T. 140-41, 146, 201-02, 253-54)

The State submitted expert testimony that the bullet had entered Mrs. Allen's head from above and behind her right side, and that due to the absence of an "stippling" or "tattooing," scars left on a person's skin resulting from gun powder striking the skin, the gun had to have been held at least two feet or more from the entrance wound (T. 311, 319). In the

expert's opinion, Mrs. Allen's injury could not have been self-inflicted (T. 320).

Davis County Detective Kent Hedenstrom testified concerning interviews with defendant on July 30 at McKay Dee Hospital and again on August 2 at defendant's residence, where defendant reenacted the shooting incident for videotaping. At the time of Detective Hedenstrom's initial interview, defendant gave approximately seven different versions of the shooting incident, some of which varied substantially from the others (T. 269-282). In each version, defendant stated that the gun went off in front of Mrs. Allen's face and that it accidentally discharged. Defendant's own expert witness, a gun-smith, testified that it would take approximately 13 pounds of energy to cause an uncocked .44 Special to discharge, that the gun would not discharge by just being bumped, and that it was "not very likely" to go off without the trigger being pulled (T. 247-49).

The registered nurse caring for Mrs. Allen in the intensive care ward of McKay Dee Hospital overheard defendant state to Mrs. Allen's mother, "I did it, I didn't mean to hurt her. I only meant to scare her. We were struggling over the gun." (T. 160.)

SUMMARY OF ARGUMENT

Defendant's failure to support his argument by legal analysis or authority gives this Court no basis from which to evaluate defendant's position.

The State presented sufficient evidence to support defendant's conviction of aggravated assault.

ARGUMENT

POINT I

DEFENDANT FAILS TO SUPPORT HIS ARGUMENT BY LEGAL ANALYSIS OR AUTHORITY.

In his appeal defendant offers neither legal analysis nor governing authority to support his contention that there was insufficient evidence to support his conviction of aggravated assault. Rule 24(a)(9) of both the Utah Supreme Court and the Utah Court of Appeals states that an appellate brief "shall contain the contentions of the appellant with respect to the issues presented and the reasons therefore, with citations to the authorities, statutes, and parts of the record relied on." In State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984), the Utah Supreme Court declined to rule on an issue because the defendant had "fail[ed] to support his argument by any legal analysis or authority." See also State v. Wareham, 772 P.2d 960, 966 (Utah 1989) ("A brief must contain some support for each contention. [Defendant's] brief totally fails to provide any reasons to support [his] contentions . . . . We therefore must disregard this issue"); State v. Pascoe, 774 P.2d 512, 514 (Utah Ct. App. 1989) ("[A]ppellant failed to support his contention with legal analysis or authority. We, therefore, decline to rule on it.")

In the instant case, defendant failed to cite even the statute under which he was convicted and presented no legal argument or authority for his contention that evidence presented at trial was insufficient to support his conviction. Therefore, this Court has no basis from which to evaluate or rule on defendant's contention.

POINT II

THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION OF AGGRAVATED ASSAULT.

Defendant argues that the evidence presented at trial was insufficient to support defendant's conviction of aggravated assault. Should this Court decide to review the merits of defendant's contention, the applicable standard of review for a sufficiency of evidence challenge has been well-established by Utah appellate courts. In State v. Booker, 709 P.2d 342, 345 (Utah 1985), the Utah Supreme Court stated:

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

(Citations omitted.) This Court has accorded great weight to a jury's verdict since the jury is in the best position to assess the credibility of witnesses and afford their testimonies appropriate weight. In State v. Lactod, 761 P.2d 23, 27 (Utah Ct. App. 1988), this Court stated:

> It is not this court's duty to measure conflicting evidence or the credibility of witnesses. That responsibility belongs strictly to the trier of fact. It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." . . . So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

(Citations omitted.)

In the instant case the State presented 21 witnesses and 31 exhibits. Although the defendant and the victim, admittedly the only two parties present at the shooting, could not or would not give testimony concerning the circumstances surrounding the victim's injury, other evidence was submitted which amply supports the jury's verdict. Mrs. Allen, with two clearly visible wounds to the head, was in rapidly deteriorating physical condition when she was admitted to the hospital one week after the shooting incident (T. 130, 474-76). Medical evidence showed that at least two bullet fragments entered her head. One lodged in the brain, the other exited her head near the right side of her nose (T. 221, 320-21). The bullet entered her head from the rear right side, not from the front, and was shot from a gun above and behind her head at a distance of two feet or more, leading an expert to conclude that the wound could not have been self-inflicted (T. 318-321). A Smith & Wesson .44 Special requires a considerable amount of pressure to shoot, unless already cocked and ready for firing, and it could not discharge by being accidentally bumped (T. 247-49).

Defendant, though professing to be unaware of Mrs. Allen's wounds or the extent of their bleeding, removed and washed the bloody seat cover from the pickup truck where the shooting occurred (T. 483-84). Bloody sheets and pillows from Mrs. Allen's week long sojourn in bed prior to hospitalization indicated the presence of an injury that continued to bleed for days after it was inflicted (T. 427-28). Defendant lied to police about his ownership of the Smith & Wesson .44 Special that

was used to shoot Mrs. Allen but had already wrapped it in a towel and stashed it under the seat of his pickup truck (T. 230, 382, 487). Mrs. Allen's close friend was repeatedly refused access to her during the week following the shooting (T. 368). A nurse heard defendant say that he had done the shooting, that he had intended to scare Mrs. Allen, and that the gun had gone off in a struggle with Mrs. Allen (T. 160). Defendant's own admission and testimony, though inconsistent, point, at least, to his participation in the shooting.

Defendant was charged and convicted of aggravated assault under Utah Code Ann. § 76-5-103(1)(b) (1978) (amended 1989), in that he used a deadly weapon, a firearm, to attempt, with unlawful force or violence, to do bodily injury to another, or threatened, accompanied by a show of immediate force or violence, to do bodily injury to another. See also Utah Code Ann. § 76-5-102 (1978) (amended 1989) (defining assault). In State v. McElhaney, 579 P.2d 328 (Utah 1978), the Utah Supreme Court held that no culpable mental state was specified under § 76-5-103(1)(b) and thus "under § 76-2-102 'intent, knowledge, or recklessness . . . suffice[d] to establish criminal responsibility.'" (Emphasis added.) See also State v. Speer, 750 P.2d 186, 191 (Utah 1988) ("aggravated assault can be committed by reckless conduct"). Pursuant to Utah Code Ann. § 76-2-103(3) (1978), a person acts recklessly:

> with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree

> that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

In the instant case, the evidence supports the jury's conclusion that defendant's actions at least constituted an attempt, with unlawful force or violence or a threat, accompanied by a show of immediate force or violence, to do bodily injury to another and that defendant's use of a deadly weapon likely to result in serious bodily injury to Mrs. Allen was, at a minimum, a reckless act. Utah Code Ann. § 76-5-102 & 103(1)(b) (1978) (amended 1989).

CONCLUSION

Based on the foregoing, this Court should affirm defendant's conviction.

RESPECTFULLY submitted this 16 day of January, 1990.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Stanley S. Adams, Attorney for Appellant, 807 East South Temple, #101, Salt Lake City, Utah 84102, this 16 day of January, 1990.